

## Standard Criminal 11

### LOST, DESTROYED, OR UNPRESERVED EVIDENCE

If you find that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the defendant's guilt.

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**Source:** *State v. Mitchell*, 140 Ariz. 551, 683 P.2d 750 (App. 1984); *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964); and *State v. Tucker*, 157 Ariz. 433, 759 P.2d 579 (1988).

**NOTE:** A defendant is entitled to a *Willits* instruction upon evidence that (1) the State failed to preserve material evidence that was accessible and might have tended to exonerate him, and (2) there is resulting prejudice to defendant. Thus, where the State places reliance on evidence such as blood, its duty of preservation becomes increasingly important, and if the State then refers to this lost evidence to support guilt, the defendant is prejudiced to the point where failure to give this instruction is reversible error.

In *Arizona v. Youngblood*, \_\_\_\_ U.S. \_\_\_\_, 109 S.Ct. 333 (1988) (49 CCH S.Ct. Bull. p. B274), the U.S. Supreme Court found no due process violation in police failure to refrigerate sodomy victim's clothing and to perform tests on semen samples.

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